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No. 78-1472

In the Supreme Court of the United States

OCTOBER TERM, 1978

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

PACIFIC LEGAL FOUNDATION, JOHN B. KILROY, THE CITY OF TORRANCE, AND THE CITY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the court of appeals is reported at 586 F.2d 650.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1978. The government's timely petition for rehearing with suggestion of rehearing en banc was denied on November 24, 1978. By order dated February 12, 1979, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari on March 23, 1979, and the petition was filed on that date. The petition was granted on June 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 402(a)(1) of the Federal Clean Water Act, 33 U.S.C. 1342(a)(1), which requires the Environmental Protection Agency to provide "opportunity for public hearing" prior to any issuance, denial, or modification of a discharge permit, requires EPA to conduct APA-type adjudicatory hearings before taking action on such permits where, after due notice of the proposed action, the only request for a hearing raises no material issue of fact.

STATUTES AND REGULATIONS INVOLVED

1. Section 402(a)(1) of the Federal Clean Water Act, 33 U.S.C. 1342(a)(1), provides in part as follows:

> [T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants * * *.

2. Sections 125.32, 125.34, and 125.36 of Title 40, Code of Federal Regulations, as promulgated by the Environmental Protection Agency on July 24, 1974, state in part as follows (39 Fed. Reg. 27079):[1]

> § 125.32 Public notice.
>
> (a) Public notice of the proposed issuance, denial or modification of every permit or denial shall be circulated in a manner designed to inform interested and potentially interested persons of the discharge and of the proposed determination to issue, deny, or modify a permit for the discharge. * * * Procedures for the circulation of public notice shall include at least the following:
>
> (1) Notice shall be circulated within the geographical area of the proposed discharge; such circulation shall include any one of the following:
>
> * * * * *
>
> (iii) Publishing in local newspapers and periodicals, or, if appropriate, in a daily newspaper of general circulation.
>
> (2) Notice shall be mailed to the applicant, Federal and State fish, shellfish and wildlife resource agencies, and other appropriate government agencies, and to any person or group upon request and shall provide an opportunity to submit their written views and recommendations on each proposed issuance.
>
> * * * * *
>
> § 125.34 Public hearings.
>
> (a) Except as provided in paragraph (d) of this section, where the Regional Administrator finds a significant degree of public interest in a proposed permit or group of permits, he shall hold a public hearing to consider such permit or permits.
>
> * * * * *
>
> § 125.36 Adjudicatory hearings.
>
> * * * * *
>
> (b) *Requests for adjudicatory hearings and legal decisions.* (1) Within 10 days following the date of determination with regard to a per-

[1] These regulations have since been revised, but none of the revisions affects any of the matters at issue here. See 44 Fed. Reg. 32854 (June 7, 1979) and note 5, *infra*.

mit pursuant to § 125.35(a) or any modification thereto, any interested person may submit to the Regional Administrator a request for an adjudicatory hearing pursuant to paragraph (b)(2) of this section or a legal decision pursuant to paragraph (m) of this section, to reconsider the determination with regard to a permit and the conditions contained therein.

(2) Requests for an adjudicatory hearing shall:

* * * * *

(v) State with particularity the reasons for the request;

(vi) State with particularity the issues proposed to be considered at the hearing; and

(vii) Include proposed terms and conditions which, in the judgment of the requestor, would be required to carry out the intendment of the Act.

(c) *Decision on a request for a hearing.* (1) Within ten (10) days following the expiration of the time allowed by paragraph (b) of this section for submitting a request for an adjudicatory hearing, the Regional Administrator shall grant the request and shall promptly assign the matter for hearing if he determines that a submitted request:

(i) Meets the requirements of paragraph (b) of this section and,

(ii) Sets forth material issues of fact relevant to the questions of whether a permit should be issued, denied or modified.

(2) If the Regional Administrator determines that the request fails to meet the requirements of paragraph (c)(1) of this section, he shall deny the request.

* * * * *

(m) *Decision of the Assistant Administrator for Enforcement and General Counsel on questions of law.* (1) Issues of law, including questions relating to the interpretation of provisions of the Act, and the legality and interpretation of regulations promulgated pursuant to the Act, shall be decided in accordance with this subsection and shall not be considered at the adjudicatory hearing.

* * * * *

(2) The Presiding Officer shall determine which issues, if any, submitted by the parties fall into the category specified in paragraph (m)(1) of this section, and shall refer such issues to the Assistant Administrator for Enforcement and General Counsel for resolution. Such referral may be accompanied by briefs, filed with the Assistant Administrator for Enforcement and General Counsel within twenty (20) days of the removal of the referred issues from the adjudicatory hearing by the Presiding Officer pursuant to paragraph (m)(2) of this section. * * *

* * * * *

(3) Where no adjudicatory hearing has been granted, issues of law may be referred by the Regional Administrator to the Assistant Administrator for Enforcement and General Counsel for a decision in the manner specified in paragraph (m)(2) of this section.

(4) The Assistant Administrator for Enforcement and General Counsel shall provide the Regional Administrator, the Presiding Officer, where appropriate, and each party with a written decision with respect to each referred issue of law. A written opinion setting forth the

reasons and basis for the decision shall also be provided. The decision of the Assistant Administrator for Enforcement and General Counsel shall be final with respect to each referred issue of law as it relates to the particular permit in question and shall be relied upon by the Regional Administrator in rendering the initial decision.

STATEMENT

1. The Federal Clean Water Act (also known as the Federal Water Pollution Control Act),[2] 33 U.S.C. 1251 *et seq.*, establishes "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. 1251(a)(1). Section 301(a) of the Act, 33 U.S.C. 1311(a), makes unlawful the discharge of any pollutant into the navigable waters of the United States, the contiguous zone, or the ocean,[3] except in compliance with the specific requirements of the Act. One such requirement is to obtain a permit issued by the Administrator under Section 402 of the Act, 33 U.S.C. 1342 and adhere to its terms.

Section 402 establishes the National Pollutant Discharge Elimination System (NPDES). Section 402(a)(1) authorizes the Administrator, "after opportunity for public hearing," to issue a permit for the discharge of any pollutant, on the condition, among others, that the discharge will meet the requirements

[2] See 91 Stat. 1566.

[3] See the definitions in Section 502(7), (8), (9), (10), and (12) of the Act, 33 U.S.C. 1362(7), (8), (9), (10), and (12).

of Section 301(b) of the Act, 33 U.S.C. 1311(b). At all times material to this case, Section 301(b)(1)(B) required that no later than July 1, 1977, "publicly owned treatment works" meet "effluent limitations based upon secondary treatment" as defined by the Administrator (see 40 C.F.R. Part 133).[4]

In 1973 EPA promulgated regulations, 40 C.F.R. Part 125, implementing the "opportunity for public hearing" required by Section 402(a)(1).[5] The

[4] On October 18, 1977, Congress amended the Act to permit the Administrator to grant extensions of this deadline through, but no later than, July 1, 1983. Pub. L. No. 95-217, Section 45, 91 Stat. 1584 (33 U.S.C. 1311(i)). The amendment also permits the Administrator to modify the effluent limitations of Section 1311(b)(1)(B) with respect to discharges by publicly owned treatment works into marine waters. Section 44, 91 Stat. 1584 (33 U.S.C. 1311(h)). Although in September 1978 Los Angeles submitted to EPA a preliminary request for a waiver under Section 301(h), it has yet to submit a final request under the regulations implementing that statutory provision, which were published on June 15, 1979 (44 Fed. Reg. 34784). EPA's regulations regarding "effluent limitations based upon secondary treatment" appear at 40 C.F.R. Part 133. They are not at issue in this suit.

Section 402 requires that NPDES permitees who discharge into "the contiguous zone" meet certain additional "ocean discharge" criteria. See Section 402(a)(1). When the substantive permit terms were set, EPA had promulgated valid regulations defining these criteria. They were withdrawn for revision at the time of the permit extension at issue here, however. PLF argued below that EPA had no authority to impose any conditions on ocean discharges in the absence of such regulations. The court of appeals found against it on this point, on which no cross-petition was filed.

[5] EPA's NPDES regulations have been comprehensively amended since the events at issue here, but these amendments do not affect the present or future importance of the issues

regulations provide for three types of hearings. First, public notice is given of EPA's proposed issuance, denial, or modification of a permit and comments are solicited. 40 C.F.R. 125.32. If EPA's regional administrator finds that there is "a significant degree of public interest" in the proposed action, he must hold a public hearing of the "legislative" type (at which any interested person may submit oral or written statements and data). 40 C.F.R. 125.34. Second, after that hearing, if one is held (or, if not, after the notice), the regional administrator must determine what action to take with respect to the proposed permit. 40 C.F.R. 125.35. Within ten days after this determination, any interested person may request an adjudicatory hearing with respect to any "material issues of fact relevant to the questions of whether a permit should be issued, denied or modified." 40 C.F.R. 125.36(b), (c)(i). A request for an adjudicatory hearing must state with particularity the reasons for the request and the issues proposed to be considered. 40 C.F.R. 125.36(b)(2). Third, any interested person may also request legal rulings by EPA's General Counsel with respect to the proposed action pursuant to 40 C.F.R. 125.36(m), under which hearing requests which raise only legal issues in effect are treated as requests for legal opinions.

Within 90 days after EPA makes a final determination, any interested person may obtain judicial review in the appropriate court of appeals of the Administrator's issuance, denial, or modification of a permit. 33 U.S.C. 1369(b)(1). Otherwise, the terms and conditions of the permit are not subject to judicial review. 33 U.S.C. 1369(b)(2).

2. Since 1960, sewage from Los Angeles has been processed at the Hyperion Wastewater Treatment Plant in Los Angeles and discharged into the Pacific Ocean. Most of the sewage has received only primary treatment. About one-third of the sewage has received additional secondary treatment. The metals

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involved in this case. These amendments retain the "material issue of fact" test for granting a hearing which is at issue here. See Section 124.75, 44 Fed. Reg. 32939 (1979). Evidentiary proceedings will therefore still be denied where (or to the extent that) no factual issues are raised, see 44 Fed. Reg. 32887 (1979). Concerning legal objections to proposed permits, the regulations specifically provide that where the regional administrator denies a hearing, he must state the reasons, see Section 124.75(d), that this denial may then be appealed to the Administrator, that the administrator may review and change "policy or legal conclusions" on which the regional administrator relied in deciding not to grant a hearing, see Section 124.101(a)(3), 44 Fed. Reg. 32944 (1979), and that the General Counsel's office shall have lead responsibility for deciding these legal issues, see Section 124.101(e).

Beyond this preservation of the essentials of the previous regulations at issue here, the new regulations go further than the old in adapting the traditional form of evidentiary hearing to better fit with EPA's experience. They now require points to be raised at the "notice-and-comment," informal stage of permit issuance before they may be raised at an evidentiary hearing, see Section 124.76, 44 Fed. Reg. 32884-32885, 32939-32940 (1979), provide for automatic admission in the evidence at the "evidentiary" stage of the process of the "administrative record" of the earlier, informal, proceedings, see Section 124.85(d)(2), 44 Fed. Reg. 32885, 32942 (1979), and, most significantly, establish new, less formal hearing procedures for "initial licensing," see 44 Fed. Reg. 32887-32892, 32944-32947 (1979).

and other solids removed during treatment, called "sludge," have been pumped through a seven-mile outfall pipe and discharged into the Pacific Ocean. The treated sewage has been discharged into the ocean through a five-mile outfall. A one-mile outfall has been used only in emergencies. (See Pet. App. 3a-6a).

In November 1974 EPA issued to respondent City of Los Angeles a permit to discharge treated sewage from its Hyperion treatment plant into the Pacific Ocean.[6] EPA published notice of its intent to issue

[6] Section 402(b) provides that the responsibility for issuing NPDES permits for discharges into navigable waters may be assumed by a state if it has an approved program, as California does. See generally *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 202-209 (1976). A federal permit is still required for discharges more than three miles from the coastline. Therefore, EPA permits are required for Hyperion's discharges through its five- and seven-mile outfalls. The California Water Quality Control Board also requires a state permit for these outfalls under a state water pollution statute. Cal. Water Code § 13260 (West 1971).

Altogether there have been twelve actions by federal and state authorities affecting the Hyperion discharge permit—four by EPA and eight by the California Regional Water Quality Control Board (the Board). All four of the federal actions were taken jointly with four of the state actions. On November 18, 1974, a permit which covered the one- and five-mile outfalls, but not the seven-mile sludge outfall, was issued jointly by EPA and the State (Board Order No. 74-329) (see Pet. App. 4a). On August 18, 1975, the 1974 permit was rescinded by the two authorities and was replaced by a joint permit which included the requirement of a gradual elimination of the secondary sludge discharge from the seven-mile outfall (Board Order No. 75-100) (App.

the permit, provided an opportunity to submit written comments, and held a public hearing on its action. (*Id.* at 4a.)

On August 18, 1975, EPA rescinded the 1974 permit and issued a new permit with a compliance schedule that gradually reduced the amount of sewage sludge which could be discharged from the Hyperion plant (A. 3-50).[7] EPA published advance public notice of its tentative determination to revise the permit and held a hearing on the proposed revisions

3-50). On January 24, 1977, the two authorities extended the 1975 permit until June 30, 1977 (A. 93-95), and on June 2, 1977, they extended the expiration date of that same permit until December 17, 1979 (Board Order Nos. 77-1 and 77-84) (A. 149-156). (The federal permit has retained the same number, CA0109991, throughout.)

During this time the Board also issued four other orders which affected only the state's compliance schedule for the sludge management project. On December 1, 1975 (Order No. 75-165), the State substituted definite dates for the measured time periods in that compliance schedule (A. 51-53). On May 24, 1976 (Order No. 76-80), the compliance dates in the schedule were extended because the City had failed to meet the initial deadlines (A. 54-58). On November 22, 1976 (Order No. 76-202), the State again extended the compliance schedule because of delays by the City (A. 59-62). On February 28, 1977 (Order No. 77-29), a progress reporting requirement was added to the State permit (A. 102-107).

[7] The 1975 permit set target dates for eliminating the sludge in three phases: (a) elimination of no less than one-third of the sludge by April 1, 1977; (b) elimination of no less than an additional one-third by October 1, 1977, and (c) termination of the discharge of sludge by April 1978 (A. 18). This schedule would have resulted in compliance with Section 301 effluent limitations and Section 403 ocean-discharge criteria. 33 U.S.C. 1311, 1343.

(App. 6). None of the respondents presented either written or oral objections to the new permit or requested an adjudicatory hearing. No one sought judicial review of EPA's issuance of this permit, and 90 days thereafter its terms and conditions were no longer subject to judicial review. 33 U.S.C. 1369 (b)(2).

3. On April 26, 1977, EPA advised the City of Los Angeles that EPA proposed to modify the 1975 permit by extending its expiration date to December 17, 1979, without otherwise disturbing its terms and conditions (A. 115-120).[8] Public notice of EPA's proposed action, including an invitation to submit comments and to request a hearing, was published in the *Los Angeles Times*, April 27, 1977 (A. 117-120, 126-128).[9] Neither respondents nor anyone else filed written comments or requested a hearing, and no hearing was held (Pet. App. 6a). On June 2, 1977, EPA issued a final determination to extend the permit (A. 149-150).

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[8] Permits may be issued for any period up to five years. 33 U.S.C. 1342(b)(1)(B). The 1975 permit originally had an expiration date of February 1, 1977. On January 24, 1977, EPA extended the permit to June 30, 1977 (A. 93-95).

[9] In addition to requiring EPA to publish its notice in a newspaper of general circulation, 40 C.F.R. 125.32(a)(2) permits any person to request in advance that EPA send him individual notice of any proposed action within a designated state or geographical area. Respondents made no such request for individual notice of proposed actions concerning the Hyperion plant. The City of Los Angeles, as the permittee, received an individual notice (A. 115-120). The other respondents received no notice other than the published notice (A. 117-120, 126-128).

On June 13, 1977, respondent John B. Kilroy, Sr., represented by attorneys for respondent Pacific Legal Foundation (PLF), filed a timely "request for an adjudicatory hearing pursuant to 40 CFR Section 125.36" (A. 159-165). A hearing request was filed only by Kilroy, a resident of the Los Angeles area (PLF Pet. For Review 2). None of the other respondents—PLF, the City of Los Angeles, and the City of Torrance—made such a request. Kilroy's request automatically stayed the effectiveness of the permit modification pending disposition of the request. See 40 C.F.R. 125.35(d)(2).

The regional administrator determined that Kilroy's request raised only issues of law, which he certified to the EPA General Counsel in accordance with 40 C.F.R. 125.36(m) (A. 168-170).[10] Kilroy then submitted a brief to the General Counsel in support of his argument that the permit modification was defective as a matter of law (A. 173-180). His brief did not contend that he desired to raise anything other than the following issues of law (A. 173-174):

1. Whether there is authority under either the applicable statutes or regulations to extend

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[10] The request stated (A. 160) that the "issues to be raised" at the adjudicatory hearing would be (1) "whether the requirements of the permit should be modified in that the project that is the subject of the compliance schedule set forth in the NPDES permit * * * is being evaluated in an EIS and * * * [whether] the compliance schedule should not be mandated * * * until the EIS is completed," and (2) "whether the procedures used and the record developed were adequate [to issue] an NPDES permit."

the expiration date of an existing National Pollutant Discharge Elimination System (NPDES) permit, or whether the action taken by EPA with regard to Permit No. CA0109991 was the issuance of a new permit; and

2. Whether EPA should require that a permittee go forward with a project contained in an NPDES compliance schedule when that project is being studied in an environmental impact statement (EIS) pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332, *et seq.*, and Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1281, *et seq.*[11]

The General Counsel ruled (A. 194-199) that EPA may extend the expiration date of a permit through a modification. Section 402 permits may be issued for terms up to five years. As long as the total duration of the extended permit does not exceed five years, she reasoned, a modification may include a time extension. The General Counsel also held that the fact that an environmental impact statement was being prepared in connection with the funding

[11] Kilroy's brief made four arguments (A. 173-180): (1) EPA has no authority to extend the expiration date of a permit because it is authorized only to issue a new permit, (2) although the Act permits "modifications," a time extension is not a "modification," (3) the action taken by the regional administrator therefore was the issuance of a new permit, and (4) the permit contained a sludge-out schedule that was then under evaluation in an environmental impact statement in connection with the funding of the landfill, and no decision on the schedule should be made pending completion of the environmental impact statement.

of the landfill project did not preclude extension of the permit. The Act expressly provides that EPA's actions on permits (other than permits to industrial dischargers which are "new sources") are exempt from NEPA. 33 U.S.C. 1371(c).

4. A petition for review of the administrator's action was filed in the court of appeals by PLF, Kilroy, and the City of Torrance (No. 77-2909).[12] A similar petition was filed by the City of Los

[12] The present proceeding is the second of three proceedings PLF has brought against EPA regarding sludge disposal by the City of Los Angeles wherein it has sought to prevent the City of Los Angeles from using a landfill located in Palos Verdes for the disposal of sludge. The first lawsuit unsuccessfully sought to enjoin EPA from funding the landfill project on the theory, among others, that no environmental impact statement was prepared by EPA with respect to its decision to fund the project. EPA voluntarily agreed, however, to prepare such a statement. *Pacific Legal Foundation* v. *Quarles*, 440 F.Supp. 316 (C.D. Cal. 1977), appeal pending, No. 77-3844 (9th Cir.). PLF's third action (the instant one being the second) was filed in the district court in Los Angeles. *PLF* v. *Andrus*, Civ. No. C-78-3464 AAH (C.D. Cal., filed Sept. 7, 1978). It alleged, among other things, that diversion of sludge from the ocean to the landfill, allegedly due to the sludge-out schedule in the 1975 permit, violated the Endangered Species Act, 16 U.S.C. 1536, because gray whales feed on plankton, which feeds on the sludge; because brown pelicans feed on anchovies, which feed on plankton, which feed on the sludge; and because trucks going to and from the landfill kill the El Segundo Butterfly. On May 3, 1979, the district court entered an order granting PLF's motion for partial summary judgment and requiring, *inter alia*, that a hearing on the NPDES permit extension, at issue here, be extended to include considerations under the Endangered Species Act. The Government is appealing that ruling.

Angeles (No. 77-3008), and the petitions were consolidated (A. 1).

The court of appeals did not question that EPA had complied with its notice-and-hearing regulations (see 586 F.2d at 653-654). Neither did the court take issue with EPA's interpretation of Kilroy's hearing request as raising only legal issues, or with the ruling of EPA's General Counsel rejecting Kilroy's legal arguments (see *id.* at 654).

Nonetheless, the court held that EPA had denied petitioners an "opportunity for public hearing" within the meaning of Section 402(a)(1) (*id.* at 657-660). The court held that EPA, before it may issue, revoke, or modify an NPDES permit, generally must hold an adjudicatory hearing, even when no one has requested one. For EPA to escape this general rule in a particular case, "[i]t must be shown that the material facts supporting the decision are not subject to dispute" (*id.* at 658-659) and that a hearing would be "futile" and would serve "absolutely no purpose" (*id.* at 659). The court acknowledged that "this is a not inconsiderable burden to place on the agency," but considered it "appropriate in view of the strong policy in favor of holding public hearings before an adjudicative decision is made" (*ibid.*).

The court suggested that there were certain facts "that may be disputed and with respect to which the record in this case is silent" that would affect the reasonableness of the compliance schedule in the extended permit (*ibid.*). The court said it could "conclude unequivocally neither that the parties have

no dispute about these matters nor that they do" (*ibid.*). Consequently, the court was "unable to deny an adjudicatory hearing on the ground that none of the material facts upon which the EPA's decision rests are disputed" (*ibid.*). In remanding the proceeding to the administrator to conduct such a hearing, the court did not limit the remand to the factual issues it had suggested. Pending the disposition of the case on remand, the court continued its stay of the compliance schedule embodied in the extended NPDES permit for the Hyperion plant.[13]

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue presented in this case is whether EPA's regulations (40 C.F.R. Part 125) provide a sufficient "opportunity for public hearing" within the meaning of Section 402(a)(1) of the Act, 33 U.S.C. 1342(a)(1). Those regulations provide for three types of "hearings": (1) a "legislative-type" hearing at which interested persons may submit information and comments to the agency, 40 C.F.R. 125.34; (2)

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[13] The court also continued its stay (by orders dated December 23, 1977, and March 29, 1978) of EPA's separate enforcement action against the City of Los Angeles for alleged violations of that schedule. *United States* v. *City of Los Angeles*, No. 77-3047 HP (C.D. Cal., filed Aug. 12, 1977). The court of appeals stayed that action, despite the fact that the enforcement action involved violations of the Hyperion permit which predated any of the governmental actions at issue in this case (the latest of those dates being January 1, 1977). Thus, it involves enforcement of permit conditions which never were challenged under 33 U.S.C. 1369(b) (see A. 1, 2, 181-191).

an "adjudicatory" hearing for the trial-type determination of "material issues of fact relevant to the questions of whether a permit should be issued, denied or modified," 40 C.F.R. 125.36(b), (c)(ii); and (3) a procedure for the submission to and determination by the agency of any issue of law concerning the issuance, revocation, denial or modification of permits, 40 C.F.R. 125.36(m).

Each type of hearing has its own prerequisites. A legislative-type hearing is required only when the regional administrator finds that there is enough public interest in the proposed action, after public notice, to warrant such a hearing. 40 C.F.R. 125.34. An adjudicatory hearing is required only if an interested person presents a request for an adjudicatory hearing which states with particularity the reasons for the request and the factual issues to be considered (40 C.F.R. 125.36(b)(1), (b)(2)), and the regional administrator determines that the request presents material issues of fact concerning whether a permit should be issued, denied or modified. 40 C.F.R. 125.36(c)(1)(ii). Determinations of issues of law are made only upon request by an interested party who sets forth the legal ground for objection to the agency actions. 40 C.F.R. 125.36(m).

In the present case, EPA determined, after public notice, that a legislative-type hearing on its time extension of the Hyperion permit was not warranted. The agency held no adjudicatory hearing because no one tendered a request presenting material issues of fact. The only request for a hearing raised only

questions of law, not of fact. The agency considered the issues and resolved them on the merits. No other objection—factual or legal—was presented. The court of appeals did not question EPA's decision not to hold a legislative-type hearing or its resolution of the issues of law presented to it.

Accordingly, had the court of appeals confined its review to those issues tendered to the agency, it would have affirmed EPA's extension of the Hyperion permit. Instead, the court construed the phrase "opportunity for public hearing" to require an automatic adjudicatory hearing in virtually all instances —even when no one advances any factual issue material to the case. Where the agency does not hold such a hearing, any person—even a stranger to the administrative proceedings—may, under the decision below, successfully set aside the administrative action by plausibly suggesting in the court of appeals that an adjudicative hearing could have uncovered a material issue of fact.

This holding was error. First, absent constitutional or specific statutory constraints, agencies are "free to fashion their own rules of procedure * * *." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). Accordingly, even when a statute calls with seemingly unequivocation for a "full hearing" before denial of a license, the agency may condition such a hearing on filing an application that pleads facts that would warrant a license. *Denver Stock Yard* v. *Livestock Association*, 356 U.S. 282, 287 (1958); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 204-

205 (1956). Otherwise, there might be a "vast proliferation of hearings" serving no purpose, a result Congress could not have intended. *FPC* v. *Texaco Inc.*, 377 U.S. 33, 39, 44 (1964). Where the statute merely calls for an "opportunity" for a hearing, it is all the clearer that the agency may impose reasonable threshold requirements. Specifically, the Court has held that a statutory "opportunity" for a hearing may be conditioned by an agency (i) on the submission of a request for a hearing, *National Coal Operators' Association* v. *Kleppe*, 423 U.S. 388, 398 (1976), and (ii) on the submission of a request or application that sets forth material issues of fact. *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620-621 (1973). These holdings are dispositive here.

Second, nothing in the legislative history of the Act suggests that Congress intended to depart from these holdings or to preclude EPA's regulations. To the contrary, the only committee report to address Section 402's hearing provision stressed the word "opportunity." *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 1490 (1973) ("Leg. Hist."). Moreover, Congress clearly knew how to require a hearing in all instances when it wanted to. The pre-1977 Act elsewhere (Section 307(a)(2)) plainly stated that the administrator "shall" hold a hearing and the legislative history correspondingly recognized that a hearing was "required." *Id.* at 312. Section 402 significantly avoids such mandatory language. Finally, the Court has traditionally refused to impute to Congress any

intent to impose an "impossible burden" on an agency. *E. I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). EPA normally grants about 100 requests for adjudicatory hearings per year in NPDES cases. The decision below would require thousands per year—even though in the vast majority no request for a hearing is ever made. Congress could not have intended to handicap the agency by imposing such a burden.

ARGUMENT

I. An Agency May Subject A Statutory "Opportunity For Public Hearing" To Reasonable Threshold Requirements Including A Requirement That The Applicant File A Request Setting Forth A Material Issue Of Fact

Absent constitutional or specific statutory constraints, administrative agencies are "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *FCC* v. *Schreiber*, 381 U.S. 279, 290 (1965); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524-525, 543-545 (1978). This principle of administrative law derives from "the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than [the] federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the

tasks of the agency involved." *FCC* v. *Schreiber*, *supra*, 381 U.S. at 290.

Only where Congress has unmistakably directed an agency to follow certain procedures is an agency deprived of its traditional authority to fashion its own procedure. Even then, the agency may adopt a practical view of the procedural directive. Thus, where a statute requires "a full hearing" before a license may be denied, the agency is free to deny the license without a hearing when the application shows an essential prerequisite cannot be met. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 204-205 (1956). Even where the statute seemingly directs a "full hearing in all instances" the Court "never presume[s] that Congress intended an agency 'to waste time on applications that do not state a valid basis for a hearing.'" *Denver Stock Yard* v. *Livestock Association*, 356 U.S. 282, 287 (1958). The agency may thus impose a procedural prerequisite to such a seemingly mandatory hearing, such as a requirement that the applicant plead facts that would warrant an administrative waiver of its substantive rules precluding substantive relief. *FPC* v. *Texaco Inc.*, 377 U.S. 33, 39-41 (1964). Otherwise, there might be a "vast proliferation of hearings" serving no useful purpose. *Id.* at 44.

In Section 402, Congress directed that EPA may grant or deny an NPDES permit after "opportunity for public hearing." Although the statute itself does not state whether the "hearing" must be a legislative-type or an adjudicatory-type hearing, EPA's regulations provide both if certain threshold requirements are met. Assuming arguendo that the statute refers to an adjudicatory hearing—as the Ninth Circuit has held—the cases just cited establish that EPA may condition the "opportunity" on (i) the presentation of a request (ii) which sets forth a material issue of fact.

First, as explained, even where the statute literally insists on a "full hearing," it is well established that the agency may condition the hearing on a request. A fortiori, where the statute merely requires the agency to provide an "opportunity," the agency may key the hearing to a request. Any other construction would read the word "opportunity" out of the Act. *National Coal Operators' Association* v. *Kleppe*, 423 U.S. 388, 389 (1976).[14] Indeed, *Kleppe* forecloses any challenge to EPA's request requirement. There, ~~as~~ here, the statute required an "opportunity for a public

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[14] The court of appeals' decision, in practice, will require EPA routinely to hold adjudicatory hearings on NPDES permit actions, even where no one requests a hearing and even where, as here, the proposed action is, for example, only a time extension of a permit whose conditions have been fully considered at previous "legislative" hearings. Thus, if EPA holds no adjudicatory hearing, all a complainant need do in order to set aside the agency's action, under the court's decision, is to suggest plausibly in the court of appeals that some members of the public might disagree concerning factual matters relevant to the Agency's action. Compare *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 553-554. This effectively means that EPA must hold an adjudicatory hearing in every instance and reduces the word "opportunity" to a nullity.

hearing" before the agency fined mine operators for violations of the Federal Coal Mine Health and Safety Act, 30 U.S.C. 801 *et seq.* The agency adopted a regulation providing that its proposed determination of a violation and proposed fine would become final without a hearing if the operators did not request an administrative adjudication within 15 days after receipt of the proposed order. The Court held that this procedure provided operators with an "opportunity" for a hearing within the meaning of the statute. Likewise, Section 402 of the Clean Water Act requires "no more than 'an opportunity' for a hearing." *National Coal Operators' Association* v. *Kleppe*, *supra*, 423 U.S. at 398.

Second, EPA is similarly entitled to condition an adjudicatory hearing on the identification of a disputed issue of material fact. The whole point of an adjudicatory hearing is to resolve issues of contested fact. If the material facts are not disputed, no adjudicatory hearing is needed. Cf. Fed. R. Civ. P. 56. Precisely such a threshold requirement was sustained in *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973). There, the statute required the FDA to give " 'due notice and opportunity for hearing to the applicant' " before withdrawing a new drug application (*id.* at 620). In a threshold regulation serving the identical screening purpose as EPA's regulation, however, the FDA required any applicant who desired a hearing to submit reasons " 'why the application * * * should not be withdrawn, together with a well-organized and full-factual analysis of the

clinical and other investigational data he [was] prepared to prove in support of his opposition to the notice of opportunity for a hearing * * *. When it clearly appear[ed] from the data in the application and from the reasons and factual analysis in the request for the hearing that there [was] *no genuine and substantial issue of fact* * * *, *e.g.*, no adequate and well-controlled clinical investigations to support the claims of effectiveness,' " the FDA was free to deny a hearing and enter an order withdrawing the application based solely on these data. 21 C.F.R. 130.14(b). (Emphasis added.) 412 U.S. at 620.

The Court sustained this regulation against the challenge that it denied the statutory "opportunity" for hearing. The Court held that the type of regulation was well within the authority of agencies under *Storer* and *Texaco* to particularize statutory standards and to bar "at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived." *Ibid.* The Court refused to "impute to Congress the design of requiring * * * a hearing when it appears conclusively from the applicant's 'pleadings' that the application cannot succeed." *Id.* at 621. Accord, *United States* v. *Consolidated Mines & Smelting Co.*, 455 F.2d 432, 453 (9th Cir. 1971); *Dyestuffs and Chemicals, Inc.* v. *Flemming*, 271 F.2d 281, 286-287 (8th Cir. 1959), cert. denied, 362 U.S. 911 (1960); *Sun Oil Co.* v. *FPC*, 256 F.2d 233, 240-241 (5th Cir.), cert. denied, 358 U.S. 872 (1958).

The same is true here. EPA's regulation conditions a hearing on the presentation of a "material

issue[] of fact relevant to the questions of whether a permit should be issued, denied or modified." 40 C.F.R. 125.36(c)(1)(ii). As in *Hynson*, this requirement avoids unnecessary and time-consuming hearings where, as here, no one challenges proposed agency action on disputed factual grounds.

In sum, in construing administrative statutes the Court has regularly construed them to permit agencies to condition statutory hearings on reasonable threshold requirements. Even where an act provides for a "full hearing" this canon of construction has been consistently applied. Here the language is even plainer—all that the agency need provide is an "opportunity" for a hearing. Unless that word is read out of Section 402, EPA is entitled to condition the right to an adjudicatory hearing (i) on the presentation of a request (ii) that frames a material issue of fact.

II. EPA's Regulations Are Consistent With The Legislative History Of The Act

Several pointers in the legislative history support the Administrator's regulations. First, nothing in it suggests that Congress meant to dispense with the traditional power of an agency to impose reasonable threshold requirements for a hearing. To the contrary, the Senate Report—the only report to address the phrase as used in Section 402—while stressing the importance of public participation in the permitting process, also stressed the word "opportunity":

> An essential element in any control program involving the nation's waters is public participation. The public must have a genuine opportunity to speak on the issue of protection of its waters. The Committee has therefore established requirements to provide opportunity for public hearing by the Federal Government, or if State participation is approved by the Administrator, the State, and other provisions to make available to the public all relevant information surrounding a discharge source and the control requirements placed on it.

Leg. Hist. 1490. The word "opportunity" in both the statute and its legislative history cannot be ignored. An opportunity is provided by granting a hearing when reasonable threshold requirements are satisfied. That the public fails to make a satisfactory request does not mean that it was not provided with an opportunity to do so. To the contrary, the opportunity was provided, but not accepted. The legislative history uses the word "opportunity" in this traditional and natural sense.

Second, Congress used the phrase "opportunity for [public] hearing[s]" seven other times in the 1972 Act (see Sections 307(b)(1); 311(b)(6); 312(g); 316(a); 404(a) and (c); 507(b)). Nowhere in the legislative history of these seven provisions is there the slightest suggestion that EPA could not impose threshold requirements or condition the hearing on a request. Instead, in discussing Section 311(b)(6), which also used the phrase, the relevant report recites that EPA should adopt "procedures which are expe-

ditious" and specifically disclaims any intent to apply the strict adjudicatory hearing requirements of 5 U.S.C. 554. Leg. Hist. 804 (House Report). Although the comment does not address our specific issue, the committee's statement plainly evidences an intent not to dispense with the administrative flexibility this Court has long recognized in the phrase "opportunity for public hearing." [15]

Third, where Congress intended elsewhere in the Act to require hearings, it said so. For example, Section 307(a)(2), as originally enacted, provided that EPA, after publishing certain proposed effluent standards, "shall publish a notice for a public hearing on such proposed standard[s] to be held within thirty days." 86 Stat. 857. The Conference Report recognized that the agency was "required to hold a hearing" by this language. Leg. Hist. 312.[16] Congress' differentiation of "required" hearings and "opportunities" for hearings—both in the statutory language and the legislative history—makes clear that Congress understood the distinction. Cf. *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979), slip op. 11.

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[15] Otherwise the committee reports ignored the phrase, *e.g.*, Leg. Hist. 313, 800, 1479 (Section 307(b)(1)); 317-318, 805, 1485 (Section 312(j)); 329, 822, 1500-1501 (Section 507(b)); or simply repeated the statutory language, 746 (Section 316(d)); 324, 817 (Section 404(a)); 324-325 (Section 404(c)).

[16] Section 307(a)(2) was amended in 1977 to eliminate the mandatory hearing requirement. The amended provision expressly makes a hearing available only on request. 91 Stat. 1589.

In sum, the indications in the legislative history are all to the effect that Congress did not intend, in Section 402, to shackle the agency with a needless requirement in all cases. It remains only to determine whether such a mandate can be derived—as the court of appeals believed—from some generalized "strong policy" in favor of adjudicatory hearings.

III. There Is No Presumption That Congress Mandated Adjudicatory Hearings In All Situations

A. The court below based its interpretation principally on "the strong policy in favor of holding [formal] public hearings before an adjudicative decision is made" (586 F.2d at 659). The origins of this policy were not identified except by a citation to the discussion concerning the Administrative Procedure Act in the court's earlier opinion in *Marathon Oil*. The APA, however, does not establish any such policy. With certain exceptions not material here (see note 21, *infra*), the APA merely describes the rulemaking or adjudicatory procedures to be followed when the relevant substantive statute provides for such hearings. *Camp* v. *Pitts*, 411 U.S. 138, 141 n.3 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972); *United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 238-246 (1973); *ITT* v. *Local 134, Int'l Bro. of Elec. Workers*, 419 U.S. 428, 438-441 (1975). A hearing voluntarily provided by agency regulation is not gov-

erned by the APA. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50 (1950).[17]

As we have seen, there is no suggestion in the statutory language or the legislative history establishing any public policy in favor of adjudicatory hearings in derogation of agencies' traditional power to set reasonable threshold requirements. To the contrary, the substantive statute provides only for an "opportunity" for a public hearing. That does not connote any automatic requirement of an adjudicatory hearing. "[T]he formal procedural requirements of the [APA] are invoked only where agency action 'on the record after opportunity for an agency hearing' is required by some other *statute*." *Attorney General's Manual on the Administrative Procedure Act* 41 (1947) (emphasis in original); see also *Administrative Procedure Act, Legislative History*, 79th Cong., 2d Sess. 22, 79, 226, 260, 359 (1944-1946). The absence of the phrase "on the record" from Section 402 demonstrates that Congress did not intend the APA-trial-type procedures for adjudicatory hearings to apply. See *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972);

[17] The Ninth Circuit's reliance (586 F.2d at 658) on *Independent Bankers Association of Georgia* v. *Board of Governors*, 516 F.2d 1206 (D.C. Cir. 1975), is misplaced. There, a request was made which set forth material issues of fact. The court acknowledged that even where a statute confers a right to "a full hearing" the agency need not provide one where the agency's action does not rest on disputed issues of fact. *Id.* at 1220. As the concurrence in that decision put it, Congress normally does not require a hearing "that will be an empty sound, * * * signifying nothing." *Id.* at 1227.

United States v. *Florida East Coast Ry.*, 410 U.S. 224, 238 (1973).[18] Any doubt on this score is eliminated by the fact that twice elsewhere the 1972 Act explicitly requires proceedings to be "on the record" and subject to 5 U.S.C. 554[19] and by the fact that the legislative history specifically disclaims that the phrase "opportunity for public hearing" (used in a different section of the same Act) is intended to invoke the "on the record" provisions of 5 U.S.C. 554.[20] Thus, contrary to the Ninth Circuit's starting

[18] But see *United States Steel Corp.* v. *Train*, 556 F.2d 822 (7th Cir. 1977); *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253 (9th Cir. 1977); *Seacoast Anti-Pollution League* v. *Costle*, 572 F.2d 872 (1st Cir. 1978).

[19] Prior to the 1977 Amendments, Section 307(a)(2) required toxic pollutant effluent standards to be set "on the record." Section 507(e) specifically requires hearings under that subsection to be "of record and * * * subject to section 554 of title 5 * * *. The authors of the FWPCA clearly knew how to invoke the APA's formal adjudication requirements when they wished to.

[20] The phase "opportunity for a [public] hearing[s]" is used in seven other provisions in the 1972 Act (see page 27). The only passage in the committee reports to discuss the phrase (as used in Section 311(b)(6)) was "not intended to impose in every instance the complex procedural requirements associated with formal adjudicatory hearings on the record * * *. The committee believes that effective administrative enforcement will be enhanced by assessment procedures which are expeditious." Leg. Hist. 804 (House Report).

The report goes on to state that "[p]rovisions of title 5 of the United States Code commonly referred to as the Administrative Procedure Act, as amended, will nevertheless apply to assure due process and protection of a respondent's rights." Leg. Hist. 804. In view of the prior sentence's disclaimer that

premise, the Section 402 hearing is not an APA-type adjudicatory hearing.[21]

Instead, the hearing contemplated by Section 402 combines both elements of a rulemaking proceeding and an adjudicatory hearing. Congress' emphasis on an opportunity for public participation in determining whether applicants may pollute the navigable waters illustrates the rulemaking aspects of the proceeding (see 33 U.S.C. 1251(e). The possible existence of factual issues and the fact that it is a permitting proceeding illustrate the adjudicatory aspects of the proceeding (see 5 U.S.C. 551(6), (7)). EPA did the practical thing and provided for both types of hearings, depending on what is appropriate in the circumstances of the case. The threshold requirements merely insure that the type of hearing, if any, provided fits the occasion. This type of hybrid procedure, which assimilates the statutory requirement into the practical administration of the statute, illustrates the wisdom of the Court's traditional deference to agencies in devising practical procedures to carry out their substantive duties. There is, however, no overriding public policy in favor of

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the proceeding would be "on the record," this reference to the APA was presumably to 5 U.S.C. 555(e), 558(c), and 706 (see note 21, *infra*).

[21] Although the rigid strictures of Section 554 do not apply to NPDES proceedings, other provisions of the APA are applicable. Notice of the denial of an NPDES application made in connection with any agency proceeding must be made promptly and accompanied by a brief statement of the grounds for denial (Section 555(e)) and licenses, once

APA-type adjudicatory hearings in licensing proceedings.[22]

B. Far from indulging a presumption that Congress always insists on full adjudicatory hearings, the Court has regularly refused to impute to Congress any rule that would place an "impossible burden" on the agency. Thus, in *E. I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), the industrial petitioner argued that in issuing permits under the Federal Water Pollution Control Act Amendments of 1972 EPA was required to give individual consideration to the circumstances of each of the more than 42,000 dischargers who have applied for NPDES

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granted, may be revoked or suspended only after notice by the agency in writing of the facts which warrant the action and an opportunity to demonstrate or achieve compliance with all lawful requirements (Section 558(c)). These provisions do not apply here because the city's application was not denied, revoked or suspended.

[22] The court also reasoned (586 F.2d at 660) that an adjudicatory hearing would yield a record "that will provide the reasons" for the agency's action. This ignores a number of points. To begin with, the agency stated, in general, the reasons for the proposed extension in its initial notice of the proposed extension (A. 117). When Kilroy made legal objections to the proposed action, the agency fully explained its reasons for rejecting those legal grounds (A. 194-199). Thus, the agency stated its reasons for rejecting every objection presented to it. Furthermore, even if a sufficient basis for the agency's action was not clear to the court of appeals, the proper procedure was to remand to the agency for an explanation of its decision to extend the permit not to require a hearing on unrelated (and unspecified) issues. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971); *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973); cf. *Dunlop* v. *Bachowski*, 421 U.S. 560, 572-574 (1975).

permits rather than set effluent limitations primarily by classes and categories. *Id.* at 132-133. This construction, the Court said, would "place an impossible burden on EPA." Such "considerations of feasibility and practicality" led the Court to conclude "that Congress would [not] have failed so conspicuously to provide EPA with the authority needed to achieve the statutory goals." *Id.* at 133. Accord, *New England Divisions Case*, 261 U.S. 184, 197 (1923); *Bowles* v. *Willingham*, 321 U.S. 503, 517 (1944); *Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177-178 (1968); *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 653 (1973); *National Coal Operators' Association* v. *Kleppe, supra*, 423 U.S. at 399; *United States Steel Corp.* v. *Train*, 556 F.2d 822, 834 n.14 (7th Cir. 1977).

The court of appeals' decision, if followed, would place an intolerable burden on EPA. In *United States Steel Corp.* v. *Train, supra*, 556 F.2d at 834 n.14, the Seventh Circuit noted that of more than 42,000 dischargers who had applied for NPDES permits, only a "relatively small percentage of cases"—"about 2,000"—had involved requests for adjudicatory hearings. In fact, EPA now grants about 100 requests per year for adjudicatory hearings under the NPDES program. The court observed that if EPA were required to conduct an adjudicatory hearing on "a substantial proportion" of permit proceedings, "the entire permit program would have become hopelessly bogged down before the agency * * *."

It is easy to see why this would be so. All NPDES permits involve at least the *potential* for factual dispute. For example, questions can arise concerning the nature of given industrial processes, their similarity to or difference from other industrial processes, and how this should affect control requirements or classification under effluent guidelines; concerning the economic impact of the proposed discharge requirement, and alternative discharge requirements; concerning the plant itself and the company and community involved; concerning the dispersal and persistence of the discharge in the receiving waters, and its effect there on numbers of different species and concerning the eco-system generally. Therefore, if the court of appeals' decision stands and "[i]t must be shown that the material facts supporting the decision are not subject to dispute," 586 F.2d at 658-659, EPA would be required to hold an APA-type adjudicatory hearing covering such issues on every permit issued by it.[23] The court of appeals' ruling would require EPA to hold adjudicatory hearings in tens of thousands of cases whether or not such hearings were requested. The Court should not impute to Congress an intent to weaken enforcement of the Act by placing such an intolerable burden on EPA.

C. Finally, EPA's consistent interpretation of the Act—that the statutory "opportunity" for a hearing

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[23] In this case and in *Marathon Oil Co.* v. *EPA, supra*, the Ninth Circuit has held that the "hearing" referred to in Section 402 must comply with the full panoply of procedural rights provided by the Administrative Procedure Act, 5 U.S.C. 554, 556 and 557. 586 F.2d at 658.

is satisfied by requiring parties to request a hearing and to identify in advance material issues of designated fact—is entitled to deference. This is particularly appropriate where, as here, the statutory scheme is characterized by an unusual "complexity and technical nature," and "there has undoubtedly been reliance upon [the agency's] interpretation by the States" in implementing parallel provisions for State NPDES programs under Section 402(b).[24] *Train* v. *NRDC*, 421 U.S. 60, 87 (1975); *E. I. duPont de Nemours & Co.* v. *Train*, *supra*, 430 U.S. 134-135 & n.26; see *EPA* v. *State Water Resources Control Board*, 426 U.S. 200 (1976).

We conclude that, once EPA published notice of its proposed action,[25] it was not required to hold any adjudicatory hearing at all unless one was requested to determine a material issue of fact. No such issue was tendered. As a result, the court of appeals should

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[24] Under Section 402(b)(3) of the Act, 33 U.S.C. 1342(b)(3), a state which administers an approved NPDES program must

> insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and * * * provide *an opportunity for public hearing* before a ruling on each such application. [Emphasis added.]

[25] EPA's notice-and-hearing regulations, as mentioned above (note 9, *supra*), give any person or organization the right to request in advance that EPA mail them individual notice concerning any matter. 40 C.F.R. 125.32(a)(2). Respondents made no such request. Persons who choose not to make such a request rely on newspaper notice. *Ibid.* The new regulations continue this basic structure. See 40 C.F.R. 124.41, 44 Fed. Reg. 32931-32933 (1979).

have confined its review to the legal issues properly presented to the agency. Because the court of appeals did not disagree with EPA's resolution of these legal issues, the court should affirm EPA's extension of the Hyperion permit.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the decision below be reversed and that this case be remanded to the court of appeals.

Respectfully submitted.

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